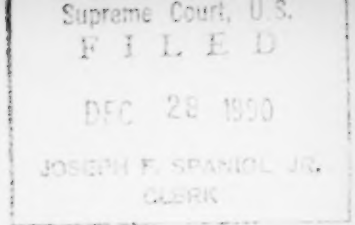


(3)

No. 90-486



IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1990

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LOWELL SAYLOR, et al.,

Petitioners,

v.

STATE OF OREGON, OREGON DEPARTMENT OF  
WATER RESOURCES, and MICHAEL F. LADD,  
WATERMASTER, DISTRICT 5, OF THE  
STATE OF OREGON WATER RESOURCES  
DEPARTMENT,

Respondents.

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ON PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS  
OF THE STATE OF OREGON

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEFARGUMENT

Respondents admit that the issue posed by this case "will present a significant federal question in some future case." Respondents' Brief at 9. Yet they seek to evade review by claiming, in their question presented, that Petitioners "conceded before the state trial court that their federal constitutional claim was unnecessary to their success on their state law claim." That is both untrue and irrelevant. It is untrue because Petitioners made no such concession and, indeed, never even pleaded a state law claim. It is irrelevant because the availability of "overlapping state remedies" does not negate a federal

civil rights claim cognizable under 42 U.S.C. § 1983. Zinermon v. Burch, 108 L.Ed.2d 100, 113 (1990).

I. PETITIONERS NEVER  
WAIVED THEIR FEDERAL CLAIM

Petitioners plainly alleged their federal claim in the original complaint filed on April 20, 1988. A full 23 days later, in the midst of the preliminary injunction hearing, the State filed a motion to strike the federal claim from Petitioners' complaint. Faced with this procedural ambush, Petitioners asked the trial judge to postpone considering the State's motion. According to the trial transcript, Petitioners' counsel simply argued that the State had no right to challenge the federal claim during an expedited preliminary injunction



hearing.[1] The trial judge agreed:

"This is not a hearing on the merits, it's a hearing for preliminary injunction, and other relief. Those Motions are therefore denied at this time. You can reurge them later."  
(Tr. 93-94).

In deflecting the State's dilatory mo-

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[1] "[A]s a preliminary matter, I think the motions to strike are premature. We can discuss those matters another day. Whether those paragraphs are in the case or not in the case, for purposes of the application for [a] preliminary [in]junction, it doesn't make any difference because what we're asking the Court to do today, Your Honor, is to enforce the decree. As far as whether . . . the State's conduct in depriving water rights is a violation of Constitutionally secured rights. That's covered in our assisting briefing in this case as well, Your Honor . . . . [I]t's in that brief that we cite the cases that stand for the proposition of water rights [as] property rights. And as property rights, water right[s] [are] not something that the State can arbitrarily [a]bridge. But again, those Motions to Strike, Your Honor, I think they are properly considered by the Court at a later time. We don't really need to talk about them today, because what we're asking for is a preliminary injunction." (Tr. 92) ("Tr." refers to the transcript of the trial below).

tion, Petitioners never disclaimed the federal constitutional claim and certainly never conceded that it was unnecessary.

The State's theory of disclaimer or abandonment conflicts with the entire record in this case. The amended complaint sought declaratory and injunctive relief based on the State's violation of Petitioners' rights under the Fifth and Fourteenth Amendments. (App. 34-36) ("App." refers to the Appendix to the Petition for Writ of Certiorari). Petitioners never pleaded a non-federal claim.

Fully cognizant of the pleadings, the State's trial counsel never asserted a disclaimer in the trial court and never renewed the motion to strike the federal claim, even though the trial judge ex-

pressly permitted the State to do so. (Tr. 94). Both points indicate the continued presence and substantiality of Petitioners' federal claim in this case.

Furthermore, in awarding Petitioners attorney fees under 42 U.S.C. § 1988, the trial court held that Petitioners were entitled to relief on their federal claim under § 1983. (App. 15-17). If Petitioners "conceded" or "disclaimed" their federal claim before the trial court, why would the very judge who conducted the preliminary injunction hearing later award relief on Petitioners' federal claim?

## II. THE STATE DID VIOLATE PETITIONERS' FEDERAL RIGHTS

Respondents present the substantive component of constitutional due process

as an archaic concept. In fact, just a few months ago, this Court reaffirmed that "the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" Zinermon v. Burch, 108 L.Ed.2d 100, 113 (1990).

The trial judge found that a substantive due process violation is precisely what occurred in this case. When Petitioners called upon the State to deliver Petitioners' vested entitlement of irrigation water, the State responded that it would perform only if Petitioners signed a written plan modifying their Water Rights Decree and forfeiting water rights already accumulated under the terms of the Decree. (App. 16-17). Petitioners refused to submit to this state-mandated

forfeiture. Faced with an impending drought, they filed this action in state court seeking a declaratory judgment that the State's action was a taking of Petitioners' property rights without just compensation and a denial of substantive due process under the Fourteenth Amendment. (App. 34-36). Petitioners sought redress of these rights pursuant to 42 U.S.C. § 1983 and requested attorney fees under 42 U.S.C. § 1988. (App. 36-37). Petitioners also sought an injunction ordering the State to restore Petitioners' irrigation water. (App. 37). Again, Petitioners presented no non-federal claims!

The trial court issued the requested injunction, holding that the State's plan "has the effect of a unilateral modification of the 1916 decree" with "no basis

for validity within the decree . . . ."

(App. 18). Petitioners then moved for attorney fees under 42 U.S.C. § 1988. Once again, Petitioners prevailed. According to the trial court's findings:

"the Watermaster's plan was an unauthorized deprivation of plaintiff's water rights. Those rights were property interests, thus plaintiffs were denied substantive due process under the U.S. Constitution."

(App. 17 (emphasis in original)).

It cannot be questioned that 42 U.S.C. § 1983 affords a remedy for this arbitrary action under color of state law. That is the essence of the trial court ruling.<sup>[2]</sup> Nor can it be questioned that, having obtained an injunc-

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[2] Even the opinion of the Oregon Court of Appeals recognized that decreed water rights are vested property interests entitled to judicial protection. (App. 9).

tion affording complete restitution of their property rights, Petitioners are "prevailing parties" entitled to recover their attorney fees from the State pursuant to 42 U.S.C. § 1988.

Respondents' suggestion that Petitioners' federal constitutional claim was subsumed in a parallel state law remedy turns federalism on its head. In effect, Respondents contend that victims of plainly unconstitutional action performed under color of state law must bear their own litigation costs whenever a post-deprivation procedural vehicle for challenging the unconstitutional action exists under state law. That is absurd: such a rule grants the states license to violate the constitutional rights of all those who cannot afford to retain legal counsel to secure legal

redress. Congress enacted § 1988 precisely to prevent such a result. Riverside v. Rivera, 477 U.S. 561, 576 (1986).

#### CONCLUSION

The case presents a central issue in the litigation of federal constitutional rights. The record presents the issue clearly, without material factual dispute, and without procedural complication. The Oregon Court of Appeals denied Petitioners' federal rights and ignored federal law. A writ of certiorari should be granted and the case remanded to reinstate the trial court's attorney fee award and for an award of attorney fees on appeal.

Respectfully submitted,  
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